IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

CHARLES BLUME, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	CASE NO. 4:12-cv-00165-DDN
INTERNATIONAL SERVICES, INC. f/k/a INTERNATIONAL PROFIT ASSOCIATES, a/k/a I.P.A.; ROI-NORTH AMERICA, INC.; GPS USA INC.; INTEGRATED BUSINESS ANALYSIS, INC., a/k/a IBA-USA,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO TRANSFER VENUE

Section 1404(a) empowers courts with discretion "to adjudicate motions to transfer according to an individualized case-by-case consideration of convenience and fairness." *Dekalb Genetics Corp. v. Syngenta Seeds, Inc.*, 2006 WL 3837143, *1 (E.D. Mo. Dec. 29, 2006). "A change of venue, although within the discretion of the district court, should not be freely granted." *Employers Reinsurance Corp. v. Massachusetts Mut. Life Ins. Co.*, 2006 WL 1235957, *1 (W.D. Mo. May 4, 2006). Plaintiff's choice of forum should be given great weight, "particularly where the plaintiff is a resident of the judicial district where the suit is brought." *Id.* (citing *Houk v. Kimberly Clark Corp.*, 613 F. Supp. 923, 927 (W.D. Mo. 1985)).

The burden is on the party seeking transfer to show that the balance of interests weighs strongly in favor of the moving party. *See Houk*, 613 F. Supp. at 927. "This is because § 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient." *Buckeye Int'l, Inc. v. Unisource Worldwide, Inc.*, No. 4:05CV0839TCM, 2005 WL 2406026, *2 (E.D. Mo. Sept. 28, 2005) (internal quotations omitted). In *Houk*, the court reiterated this weighty burden when it stated, "[w]here the balance of the relevant factors is equal or only slightly in favor of the movant, the motion to transfer should be denied." *Houk*, 613 F. Supp. at 927. For the reasons set forth below, Defendant has failed to sustain its "heavy" burden and all of the relevant factors weigh against transferring this case to Illinois or are at least neutral. The Court should deny Defendant's Motion.

The factors articulated in *Houk* overwhelmingly weigh against relocating this case to Illinois. In evaluating a motion to transfer, courts in the Eighth Circuit look to the following factors: (1) the plaintiff's choice of forum; (2) the convenience of the parties and witnesses; (3) the availability of judicial process to compel attendance of unwilling witnesses; (4) relative ease of access to sources of proof; (5) possibility of delay and prejudice if a transfer is granted; and (6) practical considerations indicating where the case can be tried more expeditiously and inexpensively.[1] *See Houk*, 613 F. Supp. at 927. As set forth below, these factors either conclusively weigh against transfer or they are neutral. In any event, Defendants cannot meet their burden to demonstrate that the balance of interests is **strongly** in their favor. *See id*. Accordingly, their Motion to Transfer Venue should be denied.

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[1] Courts also consider the governing law, particularly in cases of diversity jurisdiction. This factor is not at issue in this matter.

1. Plaintiffs' Choice of Forum is Accorded Great Weight and Should Not be Disturbed.

In considering a motion to transfer under 28 U.S.C. § 1404(a), the plaintiff's choice of forum should be given great weight, "particularly where the plaintiff is a resident of the judicial district where the suit is brought." *Employers Reinsurance Corp.*, 2006 WL 1235957 at *1. Plaintiff resides in this district, and at least 13 potential opt-in plaintiffs reside in Missouri. See Sugg. in Supp. [Doc. 12] at 2. Further, Plaintiff's choice of forum should not be disturbed "unless a balance of relative considerations tips strongly toward the defendant." *May Dep't Stores Co. v. Wilansky*, 900 F. Supp. 1154, 1165-66 (E.D. Mo. 1995) (citing *St. Louis Fed. Sav. & Loan Ass'n v. Silverado Banking, Sav. & Loan Ass'n*, 626 F. Supp. 379, 383 (E.D. Mo. 1986)); *Eggleton v. Plasser & Theurer Export Von Bahnbaumaschinen Gesellschaft, MBH*, 495 F.3d 582 (8th Cir. 2007) ("This is because [t]here is nothing ... in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.") (*quoting Van Dusen v. Barrack*, 376 U.S. 612, 633-34 (1964)); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688 (8th Cir. 1997) ("federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under section 1404(a) typically bears the burden of proving that a transfer is warranted"); *Houk*, 613 F. Supp. at 927; *Shutte v. Armoco Steel Corp.*, 431 F.2d 22 (3d Cir. 1970) (plaintiff's forum choice is to be given "paramount consideration"). Plaintiff's choice of forum should be afforded a premium under the law. Consequently, the first factor weighs against transfer.

Defendants claim that the Plaintiffs' choice of forum should not be entitled to deference, citing to cases addressing motions to transfer in the context of a Rule 23 class action. As an initial matter, this case is brought as a putative collective action under the FLSA, not a Rule 23 class action. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535-36 (8th Cir. 1975) (noting the "irreconcilable difference" between Rule 23 class actions and the FLSA). That distinction is important; because the FLSA is an opt-in procedure, rather than an opt-out mechanism, plaintiffs are instilled with more control in an FLSA action than in a traditional Rule 23 class action. In fact, after noting that "[t]he plaintiff's choice of forum should be given great weight, 'particularly when the plaintiff is a resident of the judicial district where the suit is brought," the Western District of Missouri, in *Hernandez v. Texas Capital Bank, N.A.*, 2008 U.S. Dist. LEXIS 8408 (W.D. Mo. 2008) found that a plaintiff's choice of forum in the FLSA context is entitled to significant weight, saying:

> TCB argues that Plaintiffs' choice of forum should be given less weight because of the possibility that, as a collective action, numerous plaintiffs will have widely divergent places of residence. However, Plaintiffs point out that the 'opt-in' nature of a collective action brought under the FLSA is different than a traditional class action where plaintiffs must opt-out. Courts have noted that this opt-in structure 'suggests that Congress intended to give plaintiffs considerable control over the bringing of a FLSA action.' Accordingly, the Court will give the Loan Officer Plaintiffs' choice of forum significant weight.

Other courts agree. *See, e.g.*, *Marcus v. Am. Contract Bridge League*, 562 F. Supp. 2d 360, 365 (D. Conn. 2008) (FLSA action in which court denied motion to transfer venue, noting that "the plaintiff's choice of forum should be given great weight"); *Smith v. Frac Tech Services, Ltd.*, 2009 U.S. Dist. LEXIS 97078 (E.D. Ark. 2009);

Koslofsky v. Santaturs, Inc., 2011 U.S. Dist. LEXIS 93865 at *5 (S.D.N.Y. 2011) ("Defendant argues that because Plaintiff's suit is a collective action, her choice of forum is entitled only minor deference. This Court disagrees, particularly when plaintiff lives in that forum); *Johnson v. VCG Holding Corp.*, 767 F. Supp. 2d 208 (D. Me. 2011) ("Observing that the FLSA provides an 'opt-in' procedure . . . other courts have concluded that 'Congress intended to give plaintiffs considerable control over the bringing of an FLSA action. . . . [A] plaintiff's choice of forum in a FLSA case is entitled to more deference than the choice of forum in Rule 23 national class action cases"); *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, at *10 n.2 (D.D.C. 2006); *Joyner v. Solvay Pharms., Inc.*, 2010 U.S. Dist. LEXIS 52886 (E.D. Va. 2010) (noting deference given to plaintiff's choice of forum in FLSA action, denying motion to transfer matter brought by one employee in his jurisdiction, even when defendant's corporate headquarters in other jurisdiction); *Tahir v. Avis Budget Group, Inc.*, 2009 U.S. Dist. LEXIS 115879 (D.N.J. 2009) (even in FLSA collective action, "[i]n considering a 1404(a) motion to transfer, great weight should typically be given to a plaintiff's choice of forum").

The cases cited by Defendants on pages 6-7 of their brief as support for their assertion that Plaintiffs' choice of forum should be entitled to no respect, with one exception, stand for the proposition that a plaintiff's choice of forum in a *class action* context is not entitled to deference. *See Williams v. Advance Am., Cash Adv. Centers of Mo.*, 2007 WL 3326899 (W.D. Mo. 2007) (individual consumer action merely citing to a District of Connecticut case and parenthetically describing the proposition that Defendants attribute to the case); *Silverberg, et al. v. H&R Block, Inc.*, 2006 WL

1314005 (E.D. Mo. 2006) (class action alleging improper marketing and sales of specific individual retirement accounts); *Deutsche et al. v. The Purdue Pharma Co.*, 2004 U.S. Dist. LEXIS 39978 (unfair and deceptive acts and practices); *Barnett v. Alabama*, 171 F. Supp. 2d 1292 (S.D. Ala. 2001) (voter misapportionment class action).

The only case that Defendants cite on this point that is an FLSA action, *Broussard v. Family Dollar Stores, Inc.*, 2006 WL 250484 (W.D. La. 2006), is distinguishable and is in direct conflict with other cases from its own circuit that find the opposite. *See, e.g.*, *Alix v. Shoney's, Inc.*, 1997 U.S. Dist. LEXIS 1653 at *2 (E.D. La. Feb. 18, 1997) (noting that "the opt-in structure of collective actions . . . strongly suggests that Congress intended to give plaintiffs considerable control over the bringing of an FLSA class action"); *Guerrero v. Habla Communicaciones*, 2005 U.S. Dist. LEXIS 41358 at *2 (S.D. Tex. 2006) (FLSA action in which court notes "[P]laintiff's choice of forum in this district is entitled to significant deference, because each plaintiff resides here and the operative facts occurred here"). In fact, in *Salinas v. O'Reilly Automotive*, 358 F. Supp. 2d 569 (N.D. Tex. 2005), the court noted the special nature of FLSA actions in that, unlike Rule 23 class actions, "no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively opted into the class; that is, giving his written, filed consent." Because of that special nature and the fact the plaintiff resided in the forum, his choice of forum was entitled to respect. *Id.*

Broussard is also distinguishable. At issue were Family Dollar's 6,523 stores in 44 states and the District of Columbia, and potentially thousands of opt-ins.

Broussard, 2006 U.S. Dist. LEXIS 6587 at *6-7. Notably, the court to which Family Dollar sought transfer already had similar pending FLSA actions against Family Dollar, and therefore that court would already be more familiar with the litigation.

Here, in contrast, no other court currently has FLSA litigation pending against Defendants. Defendants note that there are between 420 and 450 potential opt-ins – significantly fewer than *Broussard* – who live throughout the United States, but provide no information regarding where those persons are located.

2. Defendants Hope to Shift the Inconvenience From Themselves to Plaintiff

The convenience to parties and witnesses are factors courts consider in assessing a motion to transfer venue. However, a transfer which would merely shift the inconvenience from one party to another should not be granted. *Houk v. Kimberly-Clark Corp.*, 613 F. Supp. 923, 927 (W.D. Mo. 1985). "A case should not be transferred . . . simply to shift the burden of inconvenience from the defendant to the plaintiff." *Salinas*, 358 F. Supp. 2d 569, 572.

In support of their Motion, Defendants simply point to certain categories of individuals as their potential witnesses. That is insufficient, as "[t]he party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than on numbers." *Standard Office Sys. Of Fort Smith, Inc. v. Ricoh Corp., Inc.*, 742 F. Supp. 534, 538 (W.D. Ark. 1990). Similarly, "[i]f a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied." *Id.*; *see also Houk*, 613 F. Supp. at 928.

Defendants have merely noted that they anticipate calling "executive-level witnesses who work and/or reside in Illinois." Sugg. in Support at 9. Although in their argument section Defendants never state for what purpose those executive-level witnesses will testify, Defendants likely intend to call those witnesses to discuss "the general expectations of employees . . . general policies and procedures that are used as tools . . . rates of pay for employees . . . process[ing] timesheets, paychecks, and payroll; and . . . mainten[ance of] payroll records." Sugg. in Support at 4. Defendants also note they will call "employees in charge of payroll and who act as supervisors over the travelling business consultants" to enable Defendants to "provide the Court with fact-specific, individualized information regarding particular putative class members' day-to-day activities that are the subject of this suit." Sugg. in Support at 9. But they do not identify who those witnesses might be, why that testimony is essential, or how many people they are talking about.

At this stage of litigation, Plaintiffs can only speculate as to whether or not Defendant's named witnesses will be "material." Particularly considering the nature of this action – a violation of the Fair Labor Standards Act which the Department of Labor has already found to exist (see Complaint ¶21) – much of Defendants' proposed testimony will likely be irrelevant or immaterial. Once a violation of the Fair Labor Standards Act has been shown, the remaining evidence needed to sustain the claim is found in payroll records, testimony from plaintiffs, and expert testimony.

Furthermore, it is no more convenient for any SBCs to go to Illinois. IPA merely notes that the approximately 420 SBCs "reside throughout the United States," and that "approximately 3% of [the] consulting employees . . . reside in Missouri." Sugg. in Supp. [Doc. 14] at 2. However, there is no mention of how many of those SBCs reside in Illinois. Importantly, and to the contrary, it recognizes that SBCs reside "throughout the United States" - not that they are overwhelmingly in the Northern District of Illinois. *Id.* Accordingly, transferring this case would merely transfer the burden of travelling to Missouri to one of travelling to Illinois. Transfer would not alleviate the burden on many witnesses as they would still have to travel.

Both St. Louis and Chicago are centrally located cities with airports that are served by "a variety of major airline carriers." *Salina*, 358 F. Supp. 2d 569, 572 (noting that when "plaintiffs could come from any of the 18 states, . . . neither [jurisdiction] would be more convenient. Both cities are centrally located and, as shown by the parties, have airports that are served by a variety of major airline carriers."). Flights from Chicago to St. Louis are plentiful and short in duration, minimizing the disruption to Defendants' lives, in contrast to their assertions.

Finally, Plaintiffs' counsel is unaware of any case that finds convenience to counsel to be a factor. Of course, Defendants' counsel does not have an office in Chicago, Illinois and would therefore be prejudiced as a result of the transfer. Accordingly, even if convenience to counsel is properly considered, it is neutral here.

Again, it is not the number of witnesses, but the importance of those witnesses which matters in assessing convenience. *Ricoh Corp., Inc.*, 742 F. Supp. at 538; *see also Houk*, 613 F. Supp. at 928. The most important witnesses will be the SBCs and experts. Because this factor is at best neutral and certainly does not weigh heavily in favor of transfer, transfer should be denied. Even if at this early stage the court concluded that this factor weighed in favor of transfer, "the convenience of witnesses is only one factor, albeit a weighty one, in determining whether an action should be transferred." *See Houk*, 613 F. Supp. at 929.

3. Relative Ease of Access to Sources of Proof

Defendants assert that the majority of the evidence, including Defendants' "general policies, payment procedures, and *computerized* records for approximately 452 present and former consulting employees ... are stored and maintained at Defendants' Illinois headquarters." Sugg. in Support [Doc. 14] at 10-11 (emphasis added). Of course, Plaintiff's own documentary evidence is located in this District. But even if Defendants somehow could show that a substantial portion of the information is in Illinois, they cannot demonstrate how they will be prejudiced by making that information available for trial in Missouri – particularly when its own Suggestions in Support show that information is largely electronically maintained. *See* Sugg. In Supp. [Doc. 14] at 3 ("[T]he *payroll system* that maintains and stores all of the timekeeping records and information for the potential plaintiffs in this case is located at Defendants' headquarters in Illinois. . . . Payroll and time information is reviewed through the Company's headquarters-based *computer system* by Payroll Department personnel in Illinois") (emphasis added). Of significance is the fact that Plaintiff plans to "rely heavily on electronic presentation of evidence, which would minimize the cost and inconvenience of transferring documents to Missouri." *Employers Reinsurance Corp.*, 2006 WL 1235957, at *3.

In this day and age of electronic discovery, Defendant's assertions regarding costs of housing and transporting documents are outdated. "The location of the relevant documents is a non-issue in today's world because copy machines, electronic discovery, and emails make it much easier to obtain documents at a distance." *Marcus*, 562 F. Supp. 2d at 366. Documents are often transferred across the country at nominal costs as noted by the court in *Scheidt v. Klein* where the court chided the defendant because "Defendant never attempted to explain, let alone substantiate, why these documents could not be sifted through (at his Florida offices) and the probative ones shipped at relatively minor cost to Oklahoma for trial." 956 F.2d 963, 966 (10th Cir. 1992). Like the defendant in *Scheidt*, IPA has failed to explain why documents from Illinois cannot be shipped "at relatively minor cost" to Missouri for trial. *Id.*; *see also Houk*, 613 F. Supp. at 932 (discounting the burden of producing documents as a meaningful factor for transfer because "documents can easily be photocopied and transported from their place of storage"); *Buckeye Int'l, Inc.*, 2005 WL 2406026 at *3 ("Moving the documents from Arkansas to Missouri does not, in itself, create such an inconvenience to merit a change of venue to Arkansas.").

"As is the case with witnesses, general allegations that transfer is needed because of books and records are not enough. The moving papers must show the location and the importance of the documents." *Ricoh Corp., Inc.*, 742 F. Supp. at 538 (internal quotation omitted). Even if the location of documents could be a basis for transfer, which it is not, Defendant has failed to demonstrate the actual identity or importance of the documents located in Illinois and, therefore, has failed to meet its burden. This factor weighs against transfer.

4. The Availability of Judicial Process to Compel Attendance of Unwilling Witnesses

Defendants claim that "certain employees with knowledge and information relevant to the instant case have left or may leave the Company yet remain in the Buffalo Grove, Illinois, area, Plaintiff and possible opt-in plaintiffs wishing to subpoena such former company witnesses would clearly be better served prosecuting this case in Illinois rather than in Missouri." Sugg. in Support [Doc. 14] at 10. Defendants' argument is pure speculation. It speculates as to the identity of those witnesses (which is not supplied), that those phantom witnesses' testimony would be material, that they would no longer be employees of Defendant, that they would remain in the Buffalo Grove area, that they would refuse to testify, *see Houk*, 613 F. Supp. at 931 (noting defendant's argument "merely assumes that witnesses in question would not appear voluntarily at a trial in Missouri"), that Plaintiffs would not choose to depose them in advance of trial, and that any evidence these unnamed sources might possess could not be otherwise garnered. Without factual support for this extended hypothetical, Defendants have not demonstrated that Plaintiff is "clearly better served" litigating this case in Illinois. Defendants cannot carry their burden on the instant motion based on such speculation.

The option of securing witnesses' testimony through the discovery process, including video-taped deposition testimony, is a valid alternative to live testimony at trial. *See Warner v. Purina Mills, Inc.*, No. C98-4067-MWB, 1999 WL 33656963, *4 (N.D. Iowa Feb. 15, 1999); *see also Wash Solutions LLC v. Auto Spa of Oklahoma LLC*, No. 03-06-CV-0437, 2006 WL 1348748, *1 (N.D. Tex. May 16, 2006). Indeed, under the modern F.R.C.P. 45, it is not difficult to obtain a subpoena to depose a witness from another jurisdiction in that jurisdiction. Accordingly, Defendants' speculative assertion that Plaintiffs would not be able to compel testimony does not merit transfer, particularly when Plaintiffs can simply take those individuals' depositions for use at any trial in lieu of live testimony. *See* Federal Rule of Evidence 804(a)(5).

However and perhaps more importantly, Defendant's Motion suffers from tunnel vision—it focuses only on the Illinois Defendants and wholly ignores that moving to Illinois would not cure any inconvenience that exists; instead it would merely shift the inconvenience from one party to another, which does not justify transfer. *See Houk*, 613 F. Supp. at 928 ("a transfer which would merely shift the inconvenience from one party to another should not be granted"). Overall, Defendants have failed to meet their burden of proving that transfer would alleviate the need to compel attendance of unwilling witnesses.

5. Lack of Undue Delay in Litigating in Missouri

Transfer of this matter would, as a practical matter, cause delay in these proceedings during the transfer process. Although delay is a factor courts rightly consider in deciding motions to transfer, because of the very nature of FLSA claims, that factor is of increased importance. FLSA claims accrue (and expire) on a daily basis. The statute of limitations tolls only when a Plaintiff opts-in to the case. *See, e.g., Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 260 (S.D.N.Y. 1997). Accordingly, until Plaintiffs opt-in to this matter, their claims continue to expire. Until notice is sent after conditional certification has been briefed and ruled upon, potential plaintiffs often have no knowledge of the proceedings and therefore will not opt-into the proceedings. Any delay in the proceedings, therefore, causes material hardship on the individual members of the collective and should be avoided.

Defendants have pointed to no reasons why the Eastern District's handling of this case would cause any delays in the process. The Eastern District of Missouri's case load is not so disparate to that of the Northern District of Illinois' case load that this factor should compel transfer. Quite the opposite, respective case loads is a factor of little weight for purposes of a motion to transfer under § 1404(a), "absent a truly exceptional disparity which might exist between the dockets of the two district courts." *Houk*, 613 F. Supp. at 932. Defendant has shown no exceptional disparity between the two dockets as to warrant transfer. "Retention of the case in the present forum will not unduly delay trial of the matter." *Id.* at 932.

6. Practical Considerations Indicating Where the Case Can Be Tried More Expeditiously And Inexpensively

Defendants do not specifically address practical considerations of cost, other than reiterating that transfer should be granted because documents and Defendants' witnesses are located in Illinois. Thus, Defendants do not provide any argument regarding this particular factor. Moreover, this factor loses any import when one considers the relative financial positions of the parties. *See Houk*, 613 F. Supp. at 932 (holding that costs of producing witnesses and documents is less of a meaningful factor "due to the presumably ample financial resources of defendant"). Particularly when the defendant "is a national business whose officers regularly travel across the country and beyond to conduct their work; thus, they are more equipped to travel" this factor holds less weight. *Marcus*, 562 F. Supp. 2d at 366. Certainly, a comparison of the financial resources of the Defendant, a large corporation with "revenues of more than $250 million" with a workforce accustomed to national travel, to those of an individual Plaintiff, justifies a denial of transfer. See <http://www.ipa-c.com/about_us/aboutHome.asp> (last accessed 3/12/2012).

The Defendants neglect to note the disparity in cost of living between the St. Louis and Chicago metropolitan areas. Chicago is one of the most expensive cities in the nation, with a consumer price index of 219.324. *See* http://data.bls.gov/pdq/surveyOutputServlet?data_tool=dropmap&series_id=CUURA207SA0, CUUSA207SA0 (last accessed 3/12/2012), compared to a regional Midwestern urban average of 216.016. St. Louis, on the other hand, has a consumer price index of 210.966. *Id.* The expenses related to trial would presumably be higher in Chicago than in the St. Louis. This factor weighs in favor of Plaintiffs' choice of forum.

CONCLUSION

Defendants have not met their substantial burden in proving that transfer is warranted. Plaintiffs' choice of forum is entitled to great weight, and, even were it not, beyond the claimed inconvenience to Defendants, they have not shown why this Court should grant its motion. Merely shifting the inconvenience from one party to another is an insufficient reason for transfer. And, as Plaintiffs have shown, each of the other factors considered by courts in weighing motions to transfer tip in favor of Plaintiffs or, at the very least, are neutral. Ultimately, it is in the interest of justice to keep this case here, in the Eastern District of Missouri. Therefore, Defendants' Motion to Transfer Venue should be denied.

Dated: March 12, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was filed with the Court's CM/ECF system on this 12 day of March, 2012. That system will serve copies on all those requesting notice.

Todd C. Werts